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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

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JOHN F. COOPER, RONALD COSTIN, ROBERT J. GARCIA, JOE L. KING, RALPH MOOREHEAD, JIM R. PELL and PHILIP STANLEY,

Petitioners,

vs.

ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN, HAROLD ANDERSON, AUSTEN HAYDIS and JOHN CURRIE, constituting the members thereof,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

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QUESTIONS PRESENTED FOR REVIEW

1. Did petitioners' claims that their employment could be terminated only for cause and that they had been deprived of liberty by respondents' dissemination of false information concerning the reasons for their terminations state a constitutional deprivation under 42 U.S.C. § 1983?

2. Were petitioners required by the Court of Appeals to exhaust their administrative remedies prior to instituting their action pursuant to 42 U.S.C. § 1983?

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No. .....

In The

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JOHN F. COOPER, RONALD COSTIN, ROBERT J. GARCIA, JOE L. KING, RALPH MOOREHEAD, JIM R. PELL and PHILIP STANLEY,

Petitioners,

vs.

ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN, HAROLD ANDERSON, AUSTEN HAYDIS and JOHN CURRIE, constituting the members thereof,

Respondents.[1]

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

Findings of Fact and Conclusions of Law and Judgment in favor of respondents were entered on July 26, 1985 by the United States District Court for the District of Arizona and copies are attached as Appendices "I" and "II". Copies of the memorandum opinion of the United

[1]The caption contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

States Court of Appeals for the Ninth Circuit affirming entry of judgment and the order denying petitioners' Petition for Rehearing are attached as Appendices "III" and "IV".

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JURISDICTION

The memorandum opinion of the Court of Appeals was filed on February 20, 1987 and the order denying petitioners' Petition for Rehearing was filed on March 18, 1987. This Court has jurisdiction to review the decision under 28 U.S.C. § 1254(1).

Petitioners urge the Court to exercise its discretionary jurisdiction for the following reasons:

1. Although petitioners possessed an expectation of continued employment which constituted a property right, the Court of Appeals held that petitioners' claims that they were entitled to be terminated only for cause and that they were deprived of liberty by respondents' dissemination of false information concerning the reasons for their terminations did not show any constitutional deprivation caused by respondents;

2. The Court of Appeals, by its decision that petitioners were not entitled to prove the non-existence of cause for their terminations, required petitioners to exhaust their administrative remedies as a prerequisite to instituting an action pursuant to 42 U.S.C. § 1983 in conflict with *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the application of 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Petitioners contend that respondents' actions deprived them of rights, privileges and immunities secured by the Fourteenth Amendment, Section 1, to the United States Constitution, which states in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

—o—

STATEMENT OF THE CASE

This is the second petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this litigation. *Arizona Western College District Governing Board, et al. v. John F. Cooper, et al., cert. denied,* 469 U.S. 871 (1984). This lawsuit arose out of decisions by

the District Governing Board of Arizona Western College ("the Board") to terminate petitioners' employment contracts as faculty and administrative staff members[2] at Arizona Western College ("AWC") in meetings held on January 11, 12 and 18, of 1977. Petitioners were notified that:

> This action is taken by the Board after a review of your past performance and on the basis that the best interests of the students, faculty and institution would be served by this termination.
>
> If you feel that the non-renewal is unjustified, you may appeal this decision to the District Board pursuant to the procedure set forth in the Arizona Western College Faculty Handbook, 1975 through 1976.

(App. 6-8). The Board intentionally did not notify petitioners of the specific reasons for the non-renewal of their employment contracts. *Id.*

The AWC Faculty Handbook[3] governed the manner and method of nonrenewals of petitioners' employment contracts. (App. 5). The Handbook specified that a faculty member's employment contract could be terminated only for cause. Cause was defined as:

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[2]At the time the non-renewal decisions were made, plaintiffs held the following positions: John F. Cooper, Associate Dean of Student Affairs; Mr. Ronald Costin, Chairman, Division of Business; Mr. Robert J. Garcia, who was on sabbatical leave to Arizona State University, Professor of Communications; Mr. Joe L. King, Chairman, Division of Human and Agricultural Sciences; Dr. Ralph Moorehead, Dean of Instruction; Dr. Jim R. Pell, Dean of Student Affairs; and Dr. Philip Stanley, Chairman, Division of HPER/Athletic Director. (App. 1-3).

[3]Trial Exhibit 32.

> Cause: A faculty member's contract may not be renewed for the following:
>
> Incompetence, improper or unprofessional conduct according to the Code of Ethics, violation of terms of contractual agreements and/or other reasons which are against the best interests of students, the faculty member or the institution.

(The relevant portions of the AWC Faculty Handbook are set forth in Appendix "V"). *Id.*

On January 27, 1977, Board Chairman Charles McConnell, with the approval of the Board, issued a press release which was published in the Yuma Daily Sun and which stated, in part:

> It is and has been my feeling and that of the Board that our recent actions were entirely justified, and that we had a sound basis for taking the action which was taken.

(App. 9).

Petitioners notified the Board by letter dated January 28, 1977,[4] that they believed that the non-renewal decisions deprived them of substantive and procedural due process because there was no showing of "cause" justifying the non-renewal decisions as required by the Faculty Handbook and the Board failed to comply with the non-renewal procedures set forth in the Arizona Western College Faculty Handbook. Petitioners requested a hearing which comported with due process to challenge their terminations. On March 1, 1977, after receiving no response from the Board, petitioners filed the present action against the Board and its individual members in the United States

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[4]Trial Exhibit 30.

District Court for the District of Arizona, pursuant to 42 U.S.C. § 1983, seeking damages and reinstatement for the wrongful non-renewal of their employment contracts.[5] Petitioners contended that they had been deprived of property and liberty interests without due process of law. Petitioners' claim that they had been deprived of a property interest was based on their contention that there was a *de facto* tenure system at AWC which required that their contracts be renewed in the absence of cause justifying termination. Their claim that they were deprived of a liberty interest was based on the contention that the Board disseminated substantially false information in the community concerning the reasons for the non-renewal decisions and foreclosed their ability to take advantage of other employment opportunities.

After instituting litigation, plaintiffs received a letter dated March 3, 1977 from the Board's attorney which

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[5]At the same time, petitioners filed a Special Action in the Arizona Superior Court for Yuma County, Cause No. 38653, in which petitioners sought a declaration that the non-renewal decisions were made in violation of the Arizona Open Meeting laws. (Special Action procedure is provided for at Volume 17A, Arizona Revised Statutes and provides for extraordinary relief previously obtained by the writs of certiorari, mandamus or prohibition. Rule 1, Rules of Procedure for Special Actions). The Arizona Court of Appeals reversed the trial court's entry of summary judgment in favor of petitioners in Cause No. 38653 and remanded the case for trial. *Cooper v. Arizona Western College Dist. Governing Board,* 125 Ariz. 463, 610 P.2d 465 (App. 1980). A trial was held in July 1981 which resulted in a judgment in favor of respondents. State actions filed by petitioners after the initial grant of summary judgment in Cause No. 38653, Arizona Superior Court for Yuma County, Cause No. 41044 (Consolidated), to obtain back pay which the initial decision in Cause 38653 entitled them to, were dismissed for petitioners' failure to exhaust administrative remedies.

responded to plaintiffs' request for a hearing. (Trial Exhibit 31). Mr. Cole, on behalf of the Board, refused to afford plaintiffs the procedures requested in plaintiffs' letter of January 28, 1977:

> *None of your clients were terminated for cause and, as a result, we have not intended to produce any list of charges against them as we do not think it would be proper to proceed with this case as though your clients had been dismissed. As indicated above, we do not believe that contract renewal requires an adversarial hearing where the Board has a burden of establishing termination for cause.*

(Emphasis added).

Since respondents disputed the premise of petitioners' claims—that they had been deprived of a substantive property interest in their continued employment—and further disputed the procedural rights to which petitioners believed they were entitled, petitioners elected to proceed forward with the litigation already commenced. Petitioners did not accept the hearing offered by the Board.

On November 18, 1982, respondents filed a Motion to Dismiss, Or, In the Alternative, A Motion for Summary Judgment which was granted by the District Court on the sole basis that respondents had failed to exhaust their administrative remedies because they had not accepted the hearing offered by the Board. The Court held:

> THE COURT: The motion for summary judgment on behalf of the defendants will be granted.
>
> Even assuming *de facto* contractual relationship, the District offered a hearing to these people, complying with due process requirements, and the Board offered a full and complete hearing on the issues presented. I don't think they are properly here.

A copy of the District Court's order of February 16, 1983 dismissing petitioners' Complaint is attached as Appendix "VI".

Petitioners appealed the District Court order to the United States Court of Appeals for the Ninth Circuit. On December 23, 1983, the Court of Appeals issued its memorandum opinion, reversing the District Court judgment and remanding for further proceedings in the District Court. A copy of the memorandum opinion is attached as Appendix "VII". The Court of Appeals held:

> Exhaustion is not required. *Patsy v. Board of Regents,* 457 U.S. 496, 102 S. Ct. 2557 (1982). The District Court did not apply *Patsy* because, in its view, the administrative remedy which was offered was the very procedure for which plaintiffs had asked. *The hearing that AWC offered, however, would have excluded consideration of the issue of cause,* and made no reference to other procedural entitlements claimed by plaintiffs. There are, at the very least, genuine issues of fact concerning the nature of plaintiffs' property interest in their employment, the correlative procedural protections to which they were entitled and the extent to which the Board's offer of hearing satisfied them.

(Emphasis added). (App. 30). Respondents then petitioned for writ of certiorari which was denied on October 1, 1984. *Arizona Western College District Governing Board, et al. v. John F. Cooper, et al.,* 469 U.S. 871 (1984).

At the trial before the District Court, counsel for petitioners attempted to introduce evidence establishing that cause justifying the termination of plaintiffs' employment

never existed. (Vol. I, pp. 78-79, Vol. II, pp. 2-3).[6] The District Court ruled that evidence concerning the existence or non-existence of cause would not be admitted at trial:

> The Ninth Circuit says there are issues of fact concerning the nature of the plaintiffs' property interest in their employment, the correlative procedural protections to which they were entitled, and the extent to which the board's offer satisfied them. There is nothing in there about cause.

Vol. I, p. 79. Nor would the District Court permit introduction of evidence concerning the non-existence of cause or other evidence to establish that the Board disseminated false information regarding the reasons for non-renewal, depriving petitioners of a liberty interest.[7] Vol. II, pp. 2-3, 15-16. Finally, the District Court precluded introduction of evidence by any of the petitioners concerning damage to their standing and association in the community or their ability to take advantage of other employment opportunities. *Id.* at 15-16.

The Court of Appeals affirmed the judgment of the District Court for the reason that respondents had not denied petitioners any hearing to which they were entitled by due process of law. (App. 23). The Court held that petitioners did not demonstrate that respondents caused them any constitutional deprivation. *Id.*

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[6]Citations to the Reporter's Transcript are made by reference to the volume number of the transcript and the page.

[7]The District Court also precluded evidence of the issue of cause as a defense to the individual respondents' affirmative defense of good faith qualified immunity. *Id.* The Court concluded that the affirmative defense applied to petitioners' claims against the Board members in their individual capacities. (App. 19).

Petitioners petitioned the Court of Appeals for rehearing for the reason that the court's memorandum opinion disregarded the District Court's preclusion of evidence concerning petitioners' substantive due process claims that they were deprived of an interest in property because they were entitled to be terminated only for cause and their claim that they were subjected to a loss of liberty by the Board's dissemination of false information concerning the reasons for their termination. Petitioners argued that the Court of Appeals, by requiring petitioners to raise these claims in the hearing offered by the Board, required petitioners to exhaust their administrative remedies.

The Court of Appeals denied petitioners' petition for rehearing on March 17, 1987.

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SUMMARY OF ARGUMENT

Petitioners raised claims of deprivation of both substantive and procedural due process. In the memorandum decision of February 20, 1987, the Court of Appeals—by focusing solely on whether petitioners were deprived of any administrative hearing to which they were entitled—addressed only petitioners' claim that they had been deprived of procedural due process. (App. 26). The court then concluded that petitioners did not demonstrate that respondents caused them a constitutional deprivation. This ruling fails to take into account the prior decision on December 23, 1983, ordering a trial on the issue of the nature of petitioners' property interest in their employment and the District Court's order preventing petitioners from introducing evidence establishing deprivations of

substantive due process in their property and liberty interests.

The memorandum decision further impliedly required petitioners to raise their constitutional claims in a hearing before the Board prior to instituting litigation in the District Court. Under *Patsy v. Board of Regents*, 457 U.S. 496 (1982), petitioners had the right to litigate the existence or non-existence of cause for their terminations and their claimed deprivations of liberty in Federal Court.

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ARGUMENT

I. Petitioners Alleged a Constitutional Deprivation Cognizable Under 42 U.S.C. § 1983.

The District Court held that petitioners had a property interest in their continued employment at AWC. (App. 14). Pursuant to the terms of the AWC Faculty Handbook 1975-1976, petitioners' employment contracts were required to be renewed unless there was cause to terminate their employment. "Cause" was a term specifically defined by the Faculty Handbook. In order for cause to exist, there had to be some specific identifiable act of misconduct or omission on the part of the faculty member. (Vol. I, pp. 50-52).

Petitioners' claim that their employment at AWC could not be terminated in the absence of cause is based on a theory of substantive due process. In other words, the decision made by respondents to terminate petitioners' employment could not be arbitrary, capricious or without rational basis. *Brenna v. Southern Colorado State Col-*

lege, 589 F.2d 475, 477 (10th Cir. 1978); *Martin v. Harrah Independent School District,* 579 F.2d 1192, 1198 (10th Cir. 1978); *Jeffries v. Turkey Run Consolidated School District,* 492 F.2d 1, 3 (7th Cir. 1974). This is also the law as stated by the Arizona Court of Appeals. *McClanahan v. Cochise College,* 25 Ariz. App. 13, 20, 540 P.2d 744, 751 (1975). ("If there were no justifiable grounds for the discharge of appellant, he was denied substantive due process.").

It is petitioners' contention that cause never existed to justify the non-renewal decisions made by respondents. In its December 23, 1983 opinion, the Court of Appeals found that the nature of petitioners' property interests in their continued employment was a question of fact. (App. 31). The Court further found that the hearing offered by the Board excluded consideration of cause. The District Court's ruling precluding petitioners from introducing evidence concerning the non-existence of cause prevented petitioners from proving that they were wrongfully deprived of substantive due process in the Board's taking of their property interests.

Liberty as guaranteed by the Fourteenth Amendment includes the right of an individual "to engage in any of the common occupations of life." *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972). Section 1 of the Fourteenth Amendment "affords not only a procedural guarantee against the deprivation of liberty, but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State." *Kelley v. Johnson,* 425 U.S. 238, 244 (1976). Liberty interests are implicated in the context of public employment when a faculty member

is terminated in a manner that might seriously damage his standing and association in the community, or foreclose his freedom to take advantage of other employment opportunities. *Id.* at 573-74; *Bollow v. Federal Reserve Bank,* 650 F.2d 1093, 1100-01 (9th Cir. 1981), *cert. denied,* 455 U.S. 948 (1982). In order to establish a deprivation of a liberty interest, the discharged employee must show that the stigmatizing fact was substantially false, *Codd v. Velger,* 429 U.S. 624, 627-28 (1977), and that the stigmatizing reasons for the termination were publicly disclosed. *Bishop v. Wood,* 426 U.S. 341, 348 (1975).

Respondent Charles McConnell, on behalf of the Board, issued a press release in which he stated that the non-renewal actions were entirely justified and that there was a sound basis for taking the non-renewal actions. Petitioners intended to prove at trial that those statements were false and that the non-renewal decisions were without good cause, and were arbitrary, capricious and without rational basis. Petitioners intended to prove further that Mr. McConnell's statements, together with the manner in which petitioners' employment was terminated, damaged each of petitioners' standing and association in the community and foreclosed their ability to take advantage of other employment opportunities. The District Court denied petitioners the opportunity to introduce evidence proving those facts. Thus, petitioners were denied the opportunity to establish that they were deprived of a liberty interest without due process of law.

II. Petitioners Were Entitled to Litigate Their Substantive Due Process Claims in Federal Court.

By denying petitioners the right to present their claims in the District Court, the Court of Appeals impliedly

held that petitioners were required to raise their substantive claims before the state administrative agency prior to filing an action in Federal Court. The Court of Appeals found that respondents caused petitioners no constitutional deprivation. Given that the District Court concluded that petitioners had a property interest in their continued employment, the Court must have concluded that petitioners had an obligation to participate in the hearing offered by the Board and exhaust their administrative remedies before pursuing a § 1983 action in Federal Court. Otherwise, it would have been necessary for the Court to address the issue of cause before concluding that petitioners alleged no constitutional deprivation.

Under *Patsy v. Board of Regents*, 457 U.S. 496 (1982), petitioners were entitled to litigate their substantive due process property interest claims and liberty interest claims in Federal Court:

> [T]his Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese* [*v. Board of Education*].

Id., at 500-501.

Petitioners have the right to select the forum for presenting their claims, notwithstanding the fact that the District Court and the Court of Appeals found that petitioners had been offered a hearing which satisfied the requirements of procedural due process. As the Court stated in *Patsy v. Board of Regents*:

> The very purpose of § 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect

> the people from unconstitutional action under color of state law, "whether that action be executive, legislative or judicial".

Id. at 503. One of the primary reasons for allowing a § 1983 plaintiff to choose the Federal Court to litigate § 1983 claims was the perceived prejudice existing in the fact-finding process of a state administrative agency or court. *Id.* at 506. Thus, the Court of Appeals erred by denying petitioners the right to a full trial on the merits in the District Court on their claims that they had been deprived of substantive due process in their property interests, and of liberty.

CONCLUSION

The District Court's rulings excluded evidence that would have established an absence of cause for the employment termination decisions and that the actions of the AWC District Governing Board were arbitrary, capricious and without rational basis. The Court of Appeals decision prevented plaintiffs from presenting their claims of a substantive deprivation of constitutional rights in the federal forum without first exhausting their administrative remedies.

In view of the foregoing, petitioners respectfully request that a writ of certiorari be issued to review the memorandum decision of the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 5th day of June, 1987.

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Counsel for Petitioners

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOHN F. COOPER, RONALD COSTIN, ROBERT J. GARCIA, JOE L. KING, RALPH MOOREHEAD, JIM R. PELL, ROBERTA PURDY and PHILIP STANLEY, Plaintiffs, vs. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN, HAROLD ANDERSON, AUSTEN HAYDIS and JOHN CURRIE, constituting the members thereof, Defendants.	)	No. CIV 77-168 PHX WEC FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed July 26, 1985)

The above-captioned action having come before the Court for trial, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. During the 1976-1977 academic year, each of the plaintiffs were employed under contract as members of the faculty of Arizona Western College at Yuma, Arizona and served on that faculty in administrative or teaching positions, or both.

2. During the 1976-1977 academic year, Dr. John Cooper served on the faculty of Arizona Western College

as its Associate Dean of Student Affairs, and had served in that position continuously from July 1, 1975 through June, 1977.

3. During the 1976-1977 academic year, Mr. Ronald Costin served on the faculty of Arizona Western College as the Chairman of its Division of Business and as instructor of business courses. Mr. Costin had been a member of the faculty of Arizona Western College continuously from August, 1968 through June, 1977.

4. During the 1976-1977 academic year, Dr. Robert J. Garcia was on sabbatical leave from the faculty of Arizona Western College, but was employed by Arizona Western College as a professor of English. Dr. Garcia held that position continuously from September, 1967 through June, 1977.

5. During the 1976-1977 academic year, Mr. Joe L. King served on the faculty of Arizona Western College as the Chairman of its Division of Human and Agricultural Sciences. Mr. King served as a part-time member of the Arizona Western College faculty since 1971 and had been a full-time faculty member from August, 1976 through June, 1977.

6. During the 1976-1977 academic year, Dr. Ralph Moorehead served on the faculty of Arizona Western College as its Dean of Instruction. Dr. Moorehead held that position from July, 1973 continuously through the 1976-1977 academic year. From July, 1966 to July, 1973, Dr. Moorehead served on the faculty of Arizona Western College as Dean of Student Affairs.

7. During the 1976-1977 academic year, Dr. Jim R. Pell served on the faculty of Arizona Western College as

its Dean of Student Affairs, a position he held continuously from July, 1973 through the 1976-1977 academic year. Dr. Pell had been a member of the faculty of Arizona Western College from July, 1972 through the 1976-1977 academic year.

8. During the 1976-1977 academic year, Dr. Phillip Stanley served on the faculty of Arizona Western College as its Chairman of Health, Physical Education and Recreation, its Athletic Director, and professor of health, physical education and recreation. Dr. Stanley held those positions continuously from August, 1975 through the 1976-1977 academic year.

9. Each of the plaintiffs held the above-described positions on the Arizona Western College Faculty pursuant to contracts of employment between plaintiffs and the Board for the 1976-1977 academic year.

10. The Arizona Revised Statutes § 15-1401, *et seq.*, (previously A.R.S. § 15-651, *et seq.*), provide a comprehensive statutory scheme for the creation and operation of a statewide system of junior or community colleges subject to the jurisdiction of the State Board of Directors for Community Colleges. These statutes specify the procedures for the formation of community college districts by the voters of the geographical area which a proposed district is to serve. Once formed, such community college districts, and the community colleges which they operate and maintain, are to be governed by an elected district governing board, which is also subject to the jurisdiction of the State Board of Directors for Community Colleges.

11. Arizona Western College is a community college located within the boundaries of a community college district formed pursuant to the provisions of A.R.S. § 15.1402,

et seq. (previously A.R.S. § 15-666 *et seq.*). The defendant District Governing Board of Arizona Western College (hereinafter referred to as the Board) is a legal entity charged by the provisions of A.R.S. § 15-1441, *et seq.* (previously A.R.S. § 15-676.01, *et seq.*), with the overall supervision and administration of Arizona Western College.

12. During the 1976-1977 academic year, Charles McConnell was a member and Chairman of the Board.

13. During the 1976-1977 academic year, Walter Kammann was a member and Secretary of the Board.

14. During the 1976-1977 academic year, Harold R. Anderson was a member of the Board, taking his position in January of 1977.

15. During the 1976-1977 academic year, John A. Currie was a member of the Board.

16. During the 1976-1977 academic year, Austen Haydis was a member of the Board.

17. On December 11, 1961, after receiving the written opinion of the Attorney General that the current tenure law did not apply to junior college teachers in the state-county system, the State Board of Directors for Junior Colleges adopted the following formal resolution:

> "TENURE. A. The County Board of Governors shall establish and implement a policy which protects the staff members from unreasonable dismissal and the college from the necessity to retain incompetent teachers.
>
> B. The policy shall employ such procedures as are found in continuing contracts law; reasonable period of probation, early notification of contract renewal or

termination, written statement of reasons for dismissal for both probationary and established faculty members, and assurance of continuing equitable treatment and reasonable security after the probationary period." (*See Kaufman v. Pima Junior College,* 14 Ariz. App. 475, 484 P.2d 244 (1971).

18. In the 1976-1977 academic school year, there existed at Arizona Western College a faculty handbook (Exhibit 32) which contained administrative procedures regarding the dismissal and nonrenewal of employees under contract.

19. The court finds that the following facts which occurred prior to the events at issue in the instant case are relevant.

(a) In May of 1975 during the time that school was still in session, five hearings were held concerning the suspension of five employees of AWC: George Grooms, John Day, Jack Watson, Marion Moss, and Bruce Pieplow, after letter notices dated April 1, 1975 were directed to the five specifically alleging acts of dishonestey and/or fraud. (*see* Exhibits FF through JJ). These allegations received widespread notoriety in local, state and national news media.

(b) The 1976-1977 AWC Handbook (Exhibit 32) did not apply at the time of the suspensions or hearings for the five. The Board relied on the Yuma County Attorney to set up the hearings. The County Attorney and the employees' attorneys developed the procedures to be followed at said hearings. There were no complaints that the hearings were inadequate with respect to due process. The hearings were, however, disruptive to the students and the school as they were held during school hours in the

student union. Attorney Thadd Baker represented three of the five suspended employees: Grooms, Watson and Moss.

(c) Two of the five employees; Grooms and Pieplow; were reinstated. Of the five present defendants, three of them were Board members at the time, heard the hearings, and voted to reinstate Grooms and Pieplow (*see* Exhibit KK, minutes of board meeting of May 28, 1975). Those defendants are Jack Currie, Walter Kammann and Austen Haydis.

(d) Four of the plaintiffs in the presentation were employees of AWC at the time of the prior hearings (Pell, Moorehead, Garcia and Costin). Plaintiffs Stanley, Cooper and King were not then employed at AWC, although plaintiff King was living in the Yuma area and knew of the hearings through the news media.

20. The notice of appointment for the school year 1976-1977 for all plaintiffs was to June 30, 1977, except as to plaintiff Garcia, whose appointment was from August 16, 1976 through May 25, 1977 (*see* Exhibits 33 through 39).

21. The Arizona statute concerning junior colleges, A.R.S. 15-679, empowers the district governing board to:

> 7. Remove any officer or employee when in its judgment the interests of education or the state so require.

22. Prior to the nonrenewal of plaintiffs in this action, defendants, individually and as a board, sought legal advice regarding the open meeting law, the applicability of the AWC Handbook, and how to proceed to properly pursue nonrenewal. This included contacting the YUMA

County Attorney, Attorney Thadd Baker and Attorney Bryant Jones of the firm of Rolle, Jones, Benton & Cole (*see* Exhibit A). The defendants' counsel advised the defendant Board against giving specific reasons for nonrenewal in the notices of nonrenewal and prepared a form letter statement for the Board to use in notifying any employees of nonrenewal action (*see* Exhibits B and C).

23. On January 11, 1977, the Board met from early morning until 4:45 p.m. No discussions or actions regarding plaintiffs took place during any general session that day. Two executive sessions were held at this meeting. One such session lasted from approximately 8:30 a.m. until 2:30 p.m. and another from approximately 3:00 p.m. until 4:25 p.m. At the first executive session, the Board discussed most of the faculty members and the grounds for nonrenewing certain faculty members. At the second executive session, the Board summoned five of the eight plaintiffs plus two other employees, Bill Sims and Robert Stewart, to appear individually for the purpose of notifying them of the contemplated nonrenewal action. The form letter/statement, Exhibit C, was read to the individuals to the effect that action had been taken by the Board not to renew their contracts for the school year 1977-1978. Plaintiff King was read the statement later that day. The Board advised in the statement that: "If you feel that the nonrenewal is not justified, you may appeal this decision to the District Board pursuant to the procedures set forth in the Arizona Western College Faculty Handbook 1975-1976."

24. On January 12, 1977 three board members met with plaintiff Pell and his attorney and Pell was read the

same letter/statement that was read to the other plaintiffs on January 11, 1977.

25. On January 12, 1977, the Board met in special session with only three members present. At that meeting the Board voted to nonrenew the eight plaintiffs (*see* Exhibit 20).

26. The Board notified each of the plaintiffs by letter dated January 12, 1977 of the nonrenewal action and the right to appeal to the Board (Exhibits 23 through 29). This letter was essentially identical to the statement read at the January 11, 1977 Board meeting. The January 12, 1977 letters (Exhibits 23 through 27) were prepared from the form prepared by the Board's counsel.

27. On January 18, 1977, the Board held a special session with all members present. Plaintiffs' counsel, Jim Clark, was present. The Board took the following action:

STATEMENT ON ACTION TAKEN BY BOARD

> Mr. McConnell read the following statement:
> There appears to be some confusion concerning the action of the Board of Governors last week in serving notices of nonrenewal to certain members of the administrative staff and faculty whose names are as follows: Ron Costin, Jim Pell, Phil Stanley, John Cooper, Roberta Purdy, Joe King, Ralph Moorehead and Robert Garcia.
>
> The above named persons will retain their present titles until their present contracts terminate, and their personnel records will so reflect. They will continue to pursue their normal duties except as the same may hereafter be modified by this Board in writing, delivered to the individuals affected.

> *Requests for a hearing by any of those persons above named before the Governing Board may be submitted within a reasonable length of time.* (Emphasis added)

28. On January 27, 1977, defendant McConnell, with specific approval from the other Board members, issued a press release on behalf of the Board (Exhibit F) which stated in part as follows:

> It is and has been my feeling and that of the Board that our recent actions were entirely justified, and that we had a sound basis for taking the action which was taken. General reasons for non-renewal were provided the affected [sic] personnel, and *the Board has indicated its willingness to conduct a hearing for any of these persons should they so request.* I felt that unless such hearing was requested, a so called "bill of particulars" detailing the Board's reasons would serve no useful purpose, nor should such be released to the news media unless and until the faculty member indicated a desire for a hearing. I have scrupulously tried to avoid the adverse publicity which attended the dismissals at Arizona Western College two years ago. In my opinion, the continuing barrage of publicity releases at that time accomplished no useful purpose. (Emphasis added)

This entire press release was published on January 28, 1977 in the Yuma Daily Sun, a paper widely distributed in the vicinty of Arizona Western College, (Exhibit G). Many of plaintiffs acknowledged following the events during this period in the Yuma Daily Sun.

29. On January 28, 1977 and thereafter, the Board relied on Attorney Tom Cole of the firm of Rolle, Jones, Benton & Cole to handle any and all arrangements as to answering any requests by plaintiffs for a hearing and to set up such a hearing. Defendants exercised no control

over how this was to be accomplished. Defendants relied entirely on attorney Cole in this regard.

30. On or about February 8, 1977, Cole received from plaintiffs' attorney the letter request for a hearing[s], dated January 28, 1977, (Exhibit 30). After researching the request, Cole responded with a conciliatory letter dated March 3, 1977 (Exhibit 31). Attorney Cole's letter did not deny, refuse or in any way preclude or foreclose plaintiffs from receiving any procedural protections to which they were entitled.

31. Cole's letter of March 3, 1977 specifically offered (i) to provide plaintiffs with a hearing[s] before the Board, (ii) to provide each plaintiff with the grounds for the Board's nonrenewal action, which the plaintiffs requested be given them at least two weeks before any hearing; and (iii) to permit plaintiffs to submit evidence on their behalf at such hearing[s].

32. Cole's letter further assumed that the plaintiffs had seen all applicable legislation and policy procedures that applied to AWC, yet made it clear that if the plaintiffs wanted anything further they should let him know.

33. In the March 3, 1977 letter, Cole differentiated between giving the grounds for "nonrenewal" versus charges for a "dismissal" type termination.

34. Cole's letter further stated in the third page that " . . . we want to insure that your clients' rights are adequately protected, . . .". The letter also stated on page 3 that if plaintiffs' attorney's research indicated the procedures outlined above were "inadequate or otherwise inappropriate, we will be most pleased to receive the same so

that we can review our position". Cole's letter closed by stating: "After this exchange of views, perhaps we will develop some common grounds upon which to proceed. . . . I will await to hear from you."

35. After sending the March 3, 1977 letter Attorney Cole began interviewing witnesses and investigating in preparation for the hearing[s].

36. Neither the plaintiffs nor their attorneys requested a clarification or in any way ever responded to Cole's letter of March 3, 1977.

37. On May 6, 1977, Attorney Cole wrote to plaintiffs' attorney stating that he had received no written response to his March 3, 1977 letter (*see* Exhibit 40). Cole further stated that since plaintiffs had instituted a special action in state court seeking to set aside the actions of the Board as in violation of the open meeting law and a second action in federal court seeking a due process hearing and the specific procedure to be followed at those hearings, he assumed plaintiffs were content with the status of the record and that he was not planning on going any further with arrangements for the hearing pending the outcome of the litigation. Plaintiffs never responded to this May 6, 1977 letter.

38. There was sufficient time from the time of Cole's March 3, 1977 letter to hold hearings prior to the end of the school year or the end of the plaintiffs' contracts.

39. Plaintiffs, through their attorneys, did not expeditiously pursue the requested hearing. They did not negotiate with Cole for the hearing. They did not file a mandamus action in state court (pursuant to *Kaufman v.*

Pima Junior College, 14 Ariz.App. 475, 484 P.2d 244 (1971)) [sic] to get the hearing. They did not diligently pursue that hearing in this federal court action.

40. By not diligently and expeditiously pursuing the hearing which might have reinstated them, plaintiffs prejudiced the defendant Board in preparing for any such hearings; defendants presumptively would have had to either replace the plaintiffs or consolidate positions.

41. The individual defendants were acting in good faith in nonrenewing the plaintiffs. Defendants did not want to hurt the individual plaintiffs or their reputations and wanted to avoid the notoriety that surrounded the 1975 suspensions. Defendants therefore wished to notify the plaintiffs of the contemplated renewal in the executive session of January 11, 1977. Two other employees, Robert Stewart and Bill Sims, were also called into executive session and were told of this contemplated action. Ultimately, however, Stewart and Sims were not nonrenewed. Defendants' actions were not undertaken with any malicious intent to deprive plaintiffs of their constitutional rights.

42. In the academic school years 1976-1977, there existed at Arizona Western College a faculty handbook (Exhibit 32) which contained administrative procedures regarding the dismissal and nonrenewal of employees under contract (*see* pages 20 and 21 of Exhibit 32). The procedures regarding nonrenewal and dismissal are set forth on pages 20 and 21 of said faculty handbook.

43. The action taken by defendants against plaintiffs was a "nonrenewal" action as opposed to a "dismissal." Plaintiffs continued to work under their contracts with AWC until the end of the term of their contracts.

44. The faculty handbook provided that a faculty member's contract could be nonrenewed for "incompetence, improper or unprofessional conduct according to the Code of Ethics, violation of terms of contractual agreements, and/or other reasons which are against the best interest of students, the faculty member or the institution."

45. The handbook was drafted by a committee of faculty and administrative personnel and published by direction of the president of AWC, Dr. Garin, in approximately January of 1976. It was subsequently distributed to the faculty.

46. The handbook was never formally presented to the Board or formally approved by the Board. The defendant Board members were unsure in January of 1977 whether the handbook applied to the board or only to the administration.

47. The Court finds that plaintiffs' rights were not violated by defendants' failure to strictly adhere to the nonrenewal procedures outlined in the faculty handbook. The handbook would have required each plaintiff faculty member to have been afforded counseling sessions with his or her division chairman and the Dean of Instruction. The circumstances present in this case show that the faculty handbook was intended for use by the AWC administration, not by the District Governing Board. A strict adherence to the faculty handbook would have required the District Governing Board to provide each of the faculty members facing possible nonrenewal with counseling sessions with the Dean of Instruction, Dr. Moorehead. As Dr. Moorehead was also facing possible nonrenewal, such

counseling would have constituted a futile exercise. The same situation was present with respect to counseling sessions with the respective division chairmen. The faculty handbook would have required that all plaintiff faculty members except plaintiff Garcia be provided with counseling sessions with a supervisor who was also facing possible nonrenewal. Plaintiff Garcia's supervisor was not faced with the possibility of nonrenewal.

CONCLUSIONS OF LAW

1. The nature of plaintiffs' employment at Arizona Western College gave plaintiffs an expectation of continued employment and constituted a property right which the plaintiffs could not be deprived of without certain due process protections.

2. The plaintiffs were entitled to the following due process protections.

(a) Notice of the reasons for nonrenewal;

(b) Notice of the evidence supporting the reasons;

(c) A hearing before a tribunal of apparent impartiality;

(d) A chance to present witnesses and confront adverse evidence at the hearing.

McClanahan v. Cochise College, 25 Ariz. 13, 540 P.2d 744 (1975); *Hostrop v. Bd. of Jr. College District No. 515*, 471 F.2d 488 (7th Cir. 1975); see also *Goodrich v. Newport News School Board*, 743 F.2d 225, 227 (4th Cir. 1984).

3. The facts show that defendants offered due process to plaintiffs. Cole's letter of March 3, 1977 offered

to give plaintiffs notice of the reasons for the nonrenewal which would have been 14 days in advance of any hearing, as plaintiffs requested. Further, Cole's letter offered to provide notice of the evidence to support the reasons in a manner to be mutually agreed upon. Also, Cole's letter, along with defendants' statements, made it abundantly clear that defendants wanted to offer a hearing to plaintiffs. This court finds that the Board was the appropriate tribunal to hold those hearings. The evidence of the 1975 hearings confirms the Board's impartiality and good faith in this regard. It was implicit, if not expressed, in Cole's letter, that at the hearing plaintiffs would have been given the opportunity to present evidence and to confront adverse witnesses.

4. The facts support the conclusion of law that plaintiffs waived their due process procedural protection and rights, including but not limited to the opportunity to require the board to list the reasons for its decision and to the ultimate hearing that would have tested those reasons. Attorney Cole's letter of March 3, 1977 did not preclude or foreclose due process. It offered the grounds, i.e., reasons for the nonrenewals, differentiating between a "nonrenewal" action which the board had taken as opposed to a "dismissal" type termination. It did not deny plaintiffs any procedural protections. It was conciliatory, asking for a response if there was a misinterpretation, stating further that Cole and the Board wanted to insure that the plaintiffs' rights were protected. Plaintiffs were not entitled to reject the hearing procedures out of hand merely because it might turn out to be inadequate; adequate administrative procedures existed and if the plain-

tiffs did not wish to pursue those procedures by conferring with the board's attorney they could have diligently received the due process procedures and hearing by a mandamus action in state court, (*Kaufman v. Pima Junior College,* 14 Ariz. App. 475, 484 P.2d 244 (1971)), or by pursing [sic] this federal action through their request for a preliminary injunction requested in their complaint (see prayer of Complaint). The plaintiffs did none of these and therefore waived their rights to due process procedures, including but not limited to the opportunity to require the Board to list the reasons for its decision and to the ultimate hearing that would have tested those reasons. *Suckle v. Madison General Hospital,* 499 F.2d 1364, 1367 (7th Cir. 1974); *Correa v. Napa School District No. 131,* 645 F.2d 814, 817 (9th Cir. 1981); *Bass v. Spitz,* 410 F. Supp. 182, 184 (E.D. Mich. 1981); See also *Bignall v. North Idaho College,* 538 F.2d 243, 246-47 (9th Cir. 1976).

5. Even if attorney Cole's letter of March 3, 1977 could be interpreted as absolutely foreclosing or precluding plaintiffs from receiving due process, the governmental entity, AWC, and its Board, cannot be held vicariously liable for any alleged civil rights violations. The defendant Board members had no personal involvement or control over the manner in which Cole offered due process to the plaintiffs. *Monell v. Department of Soc. Services of the City of New York,* 436 U.S. 658, 691-96, 98 S.Ct. 2018, 2036-38, 56 L.Ed.2d 611 (1978); *May v. Enomoto,* 633 F.2d 164, 167 (9th Cir. 1980); Also see Annot., 51 ALR Fed. 285—*Vicarious Liability of Superior Under 42 U.S.C. § 1983 for Subordinates' Acts in Deprivation of Civil Rights.*

6. Plaintiffs suffered no deprivation of property *without due process of law* as adequate procedural protections existed pursuant to Arizona State law in that plaintiffs could have pursued mandamus in the State court to receive due process (per *Kaufman v. Pima Jr. College,* 14 Ariz. App. 475, 484 P.2d 244 (1971). Accordingly, there is no basis for a claim under 42 U.S.C. § 1983 for withholding any due process procedures or protections. *Due process of law was available. Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Correa v. Napa School District No. 131,* 645 F.2d 814 (9th Cir. 1981); *Dusanek v. Hannon,* 677 F.2d 538 (7th Cir. 1982); *Roy v. City of Augusta, Maine,* 712 F.2d 1517 (1st Cir. 1983); *Cohen v. City of Philadelphia,* 736 F.2d 81 (3rd Cir. 1984).

7. The doctrine of laches is applicable to the present facts. Since this case involves public employment, this court is bound by public policy which requires the prompt assertion of any employee's rights so that government service is disturbed as little as possible and two salaries are not paid for a single service. *Arant v. Lane,* 249 U.S. 367, 372, 39 S.Ct. 293, 63 L.Ed. 650 (1919) (1 year, 8 month delay; *Brown v. United States,* 418 F.2d 442, 444 (5th Cir. 1970) (2 year, 4 month delay); *Herron v. City of Chicago,* 591 F.Supp. 1565, 1568 (N.D. Ill. 1984) (several years delay). The plaintiffs delay of over five years in pursuing their due process remedies requires that their claims be barred by the operation of laches. The court's conclusion in this respect remains unaffected by the fact that defendants may have agreed to continuances over the years in this action. Plaintiffs had the duty to pursue

their due process remedies and their failure to do so cannot be excused. To allow plaintiffs to proceed would prejudice defendants because they relied on plaintiffs' inaction.

8. The Ninth Circuit's mandate of December 23, 1983 stated that the due process issues had not been encompassed in any state court litigation between the parties and thus suggested that preclusion principles, such as res judicata, may not apply to this case. Since the Ninth Circuit issued its mandate, the Supreme Court has issued a decision on the application of res judicata which must be considered and followed if applicable to the present facts. *Migra v. Warren City School District Board of Education,* — U.S. —, 104 S.Ct. 892 (January 23, 1984). Under *Migra,* even if the due process issues were not raised in another proceeding, plaintiffs are precluded from raising those issues in a 42 U.S.C. § 1983 action if the law regarding preclusion in the state where the initial action took place would preclude such action in a subsequent suit. In Arizona, a judgment is res judicata as to every issue decided in the previous action and any issue in the record which could have been decided. *Industrial Park Corp. v. U.S.I.F. Palo Verde Corp.,* 26 Ariz. App. 204, 547 P.2d 56 (1976); *Fraternal Order of Police, Lodge 2 v. The Superior Court,* 122 Ariz. 563, 565, 596 P.2d 701 (1979). Additionally, a summary judgment is on the merits in Arizona as well as in the federal courts. *Mitchell v. National Broadcasting Co.,* 553 F.2d 265 (2nd Cir. 1977); *El Paso Natural Gas Co. v. State,* 123 Ariz. 219, 599 P.2d 175 (1979). Based on the facts of this case, the *Migra* decision applies to preclude the plaintiffs from litigating their alleged Section 1983 claim in federal court when it could have been raised in the state court damage action.

9. The defense of good faith qualified immunity is applicable to this case. The Supreme Court has made it clear that public officials should not be held personally liable unless, from an objective view, they knew or should have reasonably known that the actions taken by them within the sphere of their official responsibility would violate the early established constitutional rights of plaintiffs. *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982); *Davis v. Scherer,* — U.S. —, 104 S.Ct. 3012 (1984). In 1977, it was unclear, by reference to established law, what procedures due process required defendants to follow in holding hearings on the nonrenewal of plaintiffs' contracts. This is highlighted by the fact that defendants sought out and obtained legal advice from their attorneys and it still took those attorneys several weeks to decide what they viewed as necessary under the present facts. This court therefore determines on an objective basis, that defendants did not know nor reasonably could have known that the actions they took within the sphere of their official responsibility might violate the clearly established constitutional rights of plaintiffs. Accordingly, the individual defendants are entitled to good faith qualified immunity. *See Evers v. Co. of Custer,* 745 F.2d 1196, 1203 (9th Cir. 1984); *Mabry v. State Board of Community Colleges and Occupational Education,* 597 F.Supp. 1235 (Colo. 1984).

10. Procedural due process did not require the Board to strictly follow the procedures set forth in the 1976-1977 faculty handbook and thus, to provide: (a) formal discussion and counseling sessions, (b) documentation of such formal discussion and counseling sessions or (c) the reasons for non-renewal immediately upon advising plaintiffs

of the non-renewal decision. Even if the handbook did apply to defendants' actions, defendants' failure to give plaintiffs counseling sessions, document those counseling sessions and give specific reasons in the initial notice for non-renewal would have constituted minor deviations from administrative regulations (AWC Handbook) that did not amount to due process deprivations. *Winnick v. Manning,* 460 F.2d 545 (2nd Cir. 1972); *U.S. v. Caceres,* 440 U.S. 741 (1979); *Bates v. Sponberg,* 547 F.2d 325, 329-30 (6th Cir. 1976); *Atencio v. Board of Education of Penasco Independent School District No. 4,* 658 F.2d 774 (10th Cir. 1981); *Goodrich v. Newport News School Board,* 743 F.2d 225, 227 (4th Cir. 1984); *Kaufman v. Pima Junior College Governing Board of Pima Junior College District of Pima County,* 14 Ariz. App. 475, 484 P.2d 244 (1971); *Bignall v. North Idaho College,* 538 F.2d 243 (9th Cir. 1976). Further, it was reasonable for the Board to defer giving plaintiffs the specific reasons for the nonrenewal decision until it was determined whether hearings would be held because such advance notice may have adversely affected plaintiffs' ability to secure future employment and further, may have led to publicity which would have seriously impaired the administration of the college.

11. Proof of a denial of due process requires a showing of substantial prejudice, see *U.S. v. Lober,* 630 F.2d 335 (5th Cir. 1980). The plaintiffs here did not suffer substantial prejudices as they had stated and federal court judicial remedies available to pursue a due process hearing if they did not want to negotiate with the defendant Board through their attorney.

12. In the event that any of the foregoing findings of fact should be more properly considered conclusions of

law, they should be so considered. In the event that any of the foregoing conclusions of law should be more properly considered findings of fact, they should be so considered.

IT IS SO ORDERED.

DATED this 26th day of July, 1985.

/s/ Walter E. Craig
United States District Judge

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOHN F. COOPER, RONALD COSTIN, ROBERT J. GARCIA, JOE L. KING, RALPH MOOREHEAD, JIM R. PELL, ROBERTA PURDY and PHILIP STANLEY,	)	No. CIV 77-168 PHX WEC
Plaintiffs,	)	
vs.	)	
ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN, HAROLD ANDERSON, AUSTIN HAYDIS, and JOHN CURRIE, constituting the members thereof.	)	JUDGMENT (Filed July 26, 1985)
Defendants.	)	

Pursuant to Rule 54, Federal Rules of Civil Procedure, and the Findings of Fact and Conclusions of Law filed simultaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs take nothing by their complaint and that defendants shall have and recover their costs as may be provided by law.

DATED this 26th day of July, 1985.

/s/ Walter E. Craig
United States District Judge

APPENDIX III

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN F. COOPER; et al.,	)	
	)	No. 85-2832
Plaintiffs-Appellants,	)	
v.	)	D.C. #CV-77-168-PHX-WEC
ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, et al.,	)	MEMORANDUM*
	)	(Filed February 20, 1987)
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Arizona
Walter E. Craig, District Judge, Presiding
Argued and submitted January 14, 1987
San Francisco, California

Before: GOODWIN, SCHROEDER, and FARRIS, Circuit Judges.

This is the second time that this case has been before this panel in litigation which has now spanned seven years in state and federal courts. *See Cooper v. Arizona Western College District Governing Board*, No. 83-1794 (9th Cir.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Dec. 23, 1983) (memorandum); *Cooper v. Arizona Western College District Governing Board,* 125 Ariz. 463, 610 P.2d 465 (1980). We held in 1983 that under *Patsy v. Board of Regents,* 457 U.S. 496, 102 S.Ct. 2557 (1982), the plaintiffs were not required to exhaust administrative remedies in order to maintain this 42 U.S.C. § 1983 claim in district court. We reversed the district court's entry of summary judgment in favor of the defendants because, given the state of the record at that time, there were material issues of fact concerning plaintiffs' entitlements and defendants' conduct. *See Perry v. Sinderman,* 408 U.S. 725, 92 S. Ct. 2694 (1972).

The district court trial extended over four days and produced comprehensive findings of fact and conclusions of law. We may affirm on any basis appearing in the record. *E.g., Islamic Republic of Iran v. Boeing Co.,* 771 F.2d 1279, 1288 (9th Cir. 1985), *cert. dismissed,* 107 S. Ct. 450 (1986).

The issues we asked the district court to consider included whether defendants denied plaintiffs any hearing to which they were entitled by due process of law. The evidence at trial and the district court's findings chronicled the events in 1977 when the denial of the hearing allegedly occurred. On January 27, 1977, the Board issued a press release stating that it was willing to conduct a hearing should the plaintiffs request one. Such a request was made in a letter of January 28, 1977. In response, the Board's counsel sent plaintiffs a letter dated March 3, 1977, stating its view that the Board was not required to show cause at the hearing, but could provide reasons for its action in advance and permit plaintiffs to submit evidence at the hearing in support of their position. The

letter stated the Board's position that none of the plaintiffs were terminated for cause, but it invited further discussion prior to scheduling a hearing and stated that defendants' counsel would review the Board's position if plaintiffs' research indicated "that the procedure we have outlined above is inadequate or otherwise inappropriate." The letter also offered to supply authority in support of the Board's stance. On May 6, 1977, the defendants' counsel again wrote to plaintiffs' counsel, stating that since he had received no response to his earlier letter from the plaintiffs, he "assumed [that plaintiffs] . . . were content with the status of the record" and that defendants' counsel was "not planning on going any further with arrangements for the hearings pending the outcome of [the] . . . litigation." This letter, too, was never answered.

Section 1983 provides, in pertinent part, that "[e]very person who under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." 42 U.S.C. § 1983. Before liability can be imposed, the defendants must be shown to have caused the constitutional deprivation of which plaintiffs complain. *See King v. Massarweh*, 782 F.2d 825, 828-29 (9th Cir. 1986); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

After careful review of this record and the actions taken on behalf of both plaintiffs and defendants in this dispute, we conclude that the plaintiffs have not demonstrated that defendants caused them any constitutional deprivation.

The judgment of the district court is affirmed.

APPENDIX IV

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN F. COOPER; et al.,	)	
	)	
Plaintiffs-Appellants,	)	No. 85-2832
	)	(District of
v.	)	Arizona)
	)	
ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, et al.,	)	Order
	)	(Filed March 17,
	)	1987)
	)	
Defendants-Appellees.	)	
	)	

Before: GOODWIN, SCHROEDER, and FARRIS, Circuit Judges.

The panel as constituted above has voted to deny Appellant's petition for rehearing.

APPENDIX V

ARIZONA WESTERN COLLEGE FACULTY HANDBOOK

DUE PROCESS PROCEDURE (Policy) The President of the College or his representative will provide for the establishment of Due Process procedures for the adjudication of violations of policies and rules and regulations pertaining to governance of the College.

(Due Process Procedures are covered independently under the topics of Suspension, Dismissal, Non-Renewal, and Demotion.)

Non-Renewal Procedure.

A. *Definition:* Non-Renewal is when a faculty member is not offered a new contract for the following contract period.

B. *Cause:* A faculty member's contract may not be renewed for the following: incompetence, improper or unprofessional conduct according to the Code of Ethics, violation of terms of contractual agreements, and/or other reasons which are against the best interests of students, the faculty member, or the institution.

C. *Procedure:*

1. Formal discussion and counseling will be held with the faculty member by his Division Chairman and the Dean of Instruction concerning the need for personal and/or professional improvement.

2. Discussion and counseling conferences will be documented with copies to the faculty member, the Division Chairman, and the Dean of Instruction.

3. The faculty member will be notified in writing. Such notification will include the reasons for nonrenewal. The following time schedule will be adhered to:

a. A faculty member with less than three (3) years with the institution: not later than March 1 of the Spring Semester in which the appointment expires.

b. A faculty member with three (3) years or more with the institution: not later than the end of the second school day of the Spring Semester in which the current appointment expires.

4. If the faculty member believes the non-renewal is unjustified, he may appeal directly to the District Governing Board with or without the aid of legal counsel.

APPENDIX VI

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John F. Cooper et al	)	
	)	CIV- 77-168 Phx
Plaintiff,	)	WEC
vs.	)	
	)	JUDGMENT
Arizona Western College Dist.	)	(Filed
Governing Board et al	)	February 16, 1983)
	)	
Defendant.	)	
	)	

This action came on for trial (hearing) before the Court, the Honorable Walter E. Craig, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the plaintiffs take nothing and the complaint and action are dismissed.

DATED at Phoenix, Arizona, this 16th day of February, 1983.

W. J. FURSTENAU, CLERK

By: /s/ Dorothy Ewait
Deputy Clerk

APPENDIX VII

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN F. COOPER, RONALD COSTIN, ROBERT J. GARCIA, JOE L. KING, RALPH MOOREHEAD, JIM R. PELL, ROBERTA PURDY and PHILIP [sic] STANLEY, Plaintiffs-Appellants, vs. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN [sic], HAROLD ANDERSON, AUSTIN HAYDIS and JOHN A. CURRIE, Defendants-Appellees.	No. 83-1794 D.C. # CV-77-168-WEC MEMORANDUM* (Filed December 23, 1983)

Appeal from the United States District Court
for the District of Arizona

Walter E. Craig, District Judge, Presiding
Argued and submitted November 15, 1983

Before: GOODWIN, SCHROEDER, and FARRIS, Circuit Judges.

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

In this action under 42 U.S.C. § 1983, plaintiffs, former staff and faculty members at Arizona Western College (AWC), claim that the defendants' refusal to renew their contracts deprived them of property rights in their employment without due process of law. They argue that under the faculty handbook, promulgated under state law, the board could refuse contract renewal only for cause, and that plaintiffs were entitled to greater procedural safeguards than AWC was willing to provide. The district court granted AWC's motion for summary judgment on the basis that plaintiffs had failed to exhaust their administrative remedies because they had not accepted the hearing offered by the Board.

Exhaustion is not required. *Patsy v. Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557 (1982). The district court did not apply *Patsy* because in its view the administrative remedy which was offered was the very procedure for which plaintiffs had asked. The hearing that AWC offered, however, would have excluded consideration of the issue of cause, and made no reference to other procedural entitlements claimed by plaintiffs. There are at the very least genuine issues of fact concerning the nature of plaintiffs' property interests in their employment, the correlative procedural protections to which they were entitled and the extent to which the Board's offer of hearing satisfied them.

We therefore reverse the summary judgment and remand to the district court for consideration of these issues, which were not encompassed within any state court litigation between these parties.

Reversed and remanded.